

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-2603

Criminal

UNITED STATES OF AMERICA,

APPELLEE,

vs.

Nancy K. Bistrup,

APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MINNESOTA

THE HONORABLE DAVID S. DOTY, PRESIDING

APPELLANT'S BRIEF AND ADDENDUM

Rick E. Mattox
Attorney at Law
16670 Franklin Trail SE, Suite 250
Prior Lake, Minnesota 55372
(952) 469-2299
Attorney Reg. No. 0068731

ATTORNEY FOR APPELLANT

SUMMARY AND REQUEST THAT THE CASE BE SET ON FOR ORAL ARGUMENT

The Appellant, Nancy K. Bistrup was found guilty of two counts of mail fraud, in violations of Title 18 U.S.C. ? 1341; two counts of bank fraud in violation of 18 U.S.C. ? 1344; and two counts of making false statements on a loan application in violation of 18 U.S.C. ? 1014.

The Appellant appeals the convictions. The Appellant requests oral argument in the amount of 15 minutes in order to show that the innocence of Appellant was overwhelmed by the evidence of the guilt of the codefendant, her husband. With oral argument this court will have a “real opportunity to excite the minds and sharpen the legal reasoning of at least the two judges who will not undertake the same in-depth analysis and research as the judge who drafts the opinion,”¹ and look hard at the issue of the risky decision to cooperate from the defendant’s perspective.

1 North Hills Bank v. Board of Governors of Federal Reserve System, 506 F.2d 623, (8th Cir. 1974)

TABLE OF CONTENTS

| | |
|--|------|
| SUMMARY AND REQUEST THAT THE CASE BE SET ON FOR ORAL ARGUMENT..... | i |
| TABLE OF CONTENTS | ii |
| TABLE OF AUTHORITIES..... | iii |
| JURISDICTIONAL STATEMENT..... | v |
| STATEMENT OF ISSUES | vii |
| STATEMENT OF THE CASE..... | viii |
| STATEMENT OF THE FACTS | 1 |
| SUMMARY OF THE ARGUMENT..... | 4 |
| ARGUMENTS AND APPLICABLE STANDARD OF REVIEW..... | 5 |
| CONCLUSION | 18 |
| CERTIFICATE OF SERVICE..... | 19 |
| CERTIFICATE OF DISKETTE..... | 19 |
| ADDENDUM..... | 1 |

TABLE OF AUTHORITIES

| Supreme Court Cases | Page |
|---|-----------------|
| Neder v United States (1999, US) 144 L Ed 2d 35, 119 S Ct 1827..... | vi, 12 |
| Federal Cases | |
| North Hills Bank v. Board of Governors of Federal Reserve System, 506 F.2d 623, (8th Cir. 1974)..... | i |
| United States v. Adler, 623 F.2d 1287, 1291 (8th Cir. 1980)..... | 8 |
| United States v. Baker, 200 F.3d 558 (8 th Cir. 2000)..... | 8 |
| United States v. Clapp, 46 F.3d 795, 803 (8th Cir. 1995)..... | vi, 8 |
| United States v. Derring, 592 F.2d 1003, 1007 (8th Cir. 1979)) | vii, 16 |
| United States v Corchado-Peralta (2003, CA1 Puerto Rico) 318 F3d 255..... | vi, 13 |
| United States v. Jackson, 64 F.3d 1213, 1217 (8th Cir. 1995) | vii, 17 |
| United States v Jobe (1996, CA5 Tex) 90 F3d 920..... | 12 |
| United States v Johnson (2000, CA8 Ark) 228 F3d 920..... | i, 15 |
| United States v Khamis (1982, CA5 Tex) 674 F2d 390..... | 11 |
| United States v. Lam, 338 F.3d 868, 871 (8th Cir. 2003)..... | 6 |
| United States v Lentz (1975, CA5 Ga) 524 F2d 69, reh den (1976, CA5 Ga) 526 F2d 815..... | 11 |
| United States v. Ortega, 150 F.3d 937(8th Cir. 1998)..... | vi, 15 |
| United States v Pribble (1997, CA7 Ill) 127 F3d 583, reh, en banc, den (1997, CA7 Ill)..... | 12 |
| United States v Seda (1992, CA2 NY) 978 F2d 779)..... | 11 |
| United States v Simmons (1974, CA5 Ga) 503 F2d 831..... | 11 |
| United States v. Stavroulakis, 952 F.2d 686, 694 (2d Cir. 1992)..... | 8 |
| United States v. Washington, 318 F.3d 845, 858 (8th Cir. 2003)..... | vii, 17 |
| United States v Wells (1995, CA8 Mo) 63 F3d 745, reh, en banc, den (1995, CA8)..... | vi, 10 |
| United States v Williams (1994, CA5 Miss) 12 F3d 452, reh den (1994, CA5)... | 10 |
| United States v Wiles (1996, CA10 Colo.)..... | 12 |
| Statutes | |
| Title 18 U.S.C. § 3231..... | i, ix |
| Title 28 U.S.C. § 1291..... | v, ix |
| Title 18 U.S.C. § 1001..... | 8. |
| Title 18 USCS § 1014..... | i, viii, 10, 11 |

| | |
|-----------------------------|--------------------|
| Title 18 U.S.C. § 1341..... | viii, 8, 12, 15 |
| Title 18 U.S.C. § 1343..... | 12 |
| Title 18 U.S.C. § 1344..... | iii, 8, 11, 12, 15 |

Rules

| | |
|--|----|
| Federal Rules of Appellate Procedure 3..... | ix |
| Federal Rules of Appellate Procedure 4..... | ix |
| Federal Rules of Criminal Procedure Rule 16..... | 14 |
| Federal Rules of Evidence 402..... | 16 |
| Federal Rules of Evidence. 403..... | 16 |
| Notes of Advisory Committee, Federal Rules of Evidence. 403..... | 16 |

JURISDICTIONAL STATEMENT

Appellant Nancy K. Bistrup was indicted initially along with her husband on November 13, 2003, and then by a superceding indictment on January 13, 2004 in the District of Minnesota with six counts out of a total of thirty eight counts in an indictment charging two counts of mail fraud, in violations of Title 18 U.S.C. ? 1341; two counts of bank fraud in violation of 18 U.S.C. ? 1344; and two counts of making false statements on a loan application in violation of 18 U.S.C. ? 1014.

This appeal is made from jury verdicts of guilty on June 16, 2004 and the sentence imposed at a sentencing hearing conducted on June 7, 2005, by the Honorable David S. Doty. Nancy K. Bistrup timely filed a Notice of Appeal on June 8, 2005. Jurisdiction in the District Court was invoked by the Indictment and 18 U.S.C. §3231. This Court has jurisdiction of an appeal from the District Court under 28 U. S. C. § 1291, wherein, “[t]he court of appeals. . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States,” and Rule 3 and Rule 4(b) of the Federal Rules of Appellate Procedure.

STATEMENT OF ISSUES

I

WHERE THE APPELLANT DID NOT KNOWINGLY MAKE FALSE STATEMENTS ON LOAN APPLICATIONS AND THE FALSE STATEMENTS MADE BY HER HUSBAND, THROUGH THE MORTGAGE BROKER, WERE NOT MATERIAL, BECAUSE HER HUSBAND HAD SUFFICIENT, ALBEIT, ILLEGAL INCOME, THE JURY VERDICTS SHOULD BE REVERSED AND A NEW TRIAL GRANTED

Neder v United States (1999, US) 144 L Ed 2d 35, 119 S Ct 1827

United States v. Clapp, 46 F.3d 795, 803 (8th Cir. 1995)

United States v Corchado-Peralta (2003, CA1 Puerto Rico) 318 F3d 255

United States v Wells (1995, CA8 Mo) 63 F3d 745, reh, en banc, den (1995, CA8)

II

WHERE THE GOVERNMENT INTRODUCED EXPERT WITNESSES TESTIMONY DEVELOPED AFTER THE START OF THE TRIAL WITHOUT CLEAR AND ADEQUATE NOTICE TO THE APPELLANT AND TRIAL COURT, AND WHERE CLEAR AND ADEQUATE NOTICE WOULD HAVE CAUSED THE COURT TO BAR SUCH TESTIMONY, THE JURY VERDICTS SHOULD BE REVERSED AND A NEW TRIAL GRANTED

United States v Johnson (2000, CA8 Ark) 228 F3d 920

United States v. Ortega, 150 F.3d 937(8th Cir. 1998)

III

WHERE COURT BARRED THE APPELLANT FROM OFFERING EVIDENCE OF THE CO-DEFENDANT'S EXTRA MARTIAL AFFAIR THE JURY VERDICTS SHOULD BE REVERSED AND A NEW TRIAL GRANTED

United States v. Derring, 592 F.2d 1003, 1007 (8th Cir. 1979))

United States v. Washington, 318 F.3d 845, 858 (8th Cir. 2003)
United States v. Jackson, 64 F.3d 1213, 1217 (8th Cir. 1995)

STATEMENT OF THE CASE

This is an appeal by Nancy K. Bistrup from the judgment of the United States District Court, the Honorable David S. Doty, following her jury trial and guilty verdicts to violations of Title 18 U.S.C. ? 1341, two counts of mail fraud; 18 U.S.C. ? 1344, two counts of bank fraud; and 18 U.S.C. ? 1014, two counts of making false statements on a loan application.

A second superseding indictment dated February 18, 2004 was filed against the Mrs. Bistrup charging her with two counts of mail fraud (18 U.S.C. ? 1341) two counts of bank fraud(18 U.S.C. ? 1344), and two counts of making false statements on a loan application(18 U.S.C. ? 1014). The codefendant, her husband, was charged with these same counts as well as another count of making false statement on a loan application, seventeen counts of securities fraud, four counts of wire fraud, and ten counts of money laundering. (Second Superseding Indictment.)

The trial began on May 24, 2004 and ended with the guilty verdicts on June 16, 2004.

On June 7, 2005, Senior Judge David S Doty sentenced Mrs. Bistrup to the custody of the Bureau of Prisons for a period of time served on each of Counts 1, 2, 3, 4, 6 and 7, all to be served concurrently. Mrs. Bistrup was sentenced to 3 years Supervised Release, consisting of 2 years on each of Counts 1 and 2 and 3 years on

each of Counts 3, 4, 6, and 7, all to run concurrently. Mrs. Bistrup was fined \$1,000.00 and given a special assessment of \$600.00.

Mrs. Bistrup filed her notice of appeal on June 8, 2005.

Jurisdiction of the District Court was conferred by the indictment and by Title 18 U.S.C. § 3231. Jurisdiction of this Court is invoked by Title 28 U.S.C. § 1291, Rules 3 and 4, Federal Rules of Appellate Procedure, and the timely filing of Mrs. Bistrup's Notice of Appeal on June 8, 2005.

STATEMENT OF THE FACTS

On May 21, 1999, husband and wife, Alan K. Bistrup and the Appellant, Nancy K. Bistrup, purchased a town house from Nedegaard Construction located at 14915 Wilds Parkway, Prior Lake, Minnesota. The Bistrups obtained financing for the purchase of that home through mortgages from Norwest Bank and U.S. Bank. Alan K. Bistrup falsely stated the he had paid Nedegaard the complete \$250,000 down payment. Mrs. Bistrup was not aware of that false statement. Alan K. Bistrup falsely stated that Nancy K. Bistrup had been the vice-president for Eagle Distributing for 12 years, with an income of approximately \$10,500 per month; and that he had an income of \$34,000 per month. Mrs. Bistrup was not aware of those false statements.

On May 21, 1999, Mrs. Bistrup, unable to get off from work as a bank teller, hurriedly signed and initialed the forty to fifty closing documents in a space of 15 minutes on the hood of a car in Mankato, Minnesota on a lunch break from her part time job. She signed an affidavit that she was employed at U. S. Bank. She never told the closer she was vice-president for Eagle Distributing for 12 years. As a result of the initial mortgage, the Government brought two counts of mail from resulting from the post closing distribution of the funds.

The Bistrups later refinanced the town house on January 17, 2001, the first refinancing, and May 13 2002, the second refinancing, both through Lehman Brothers Bank, FSB. The first refinancing resulted in count 3, bank fraud, and count 6, false

statement on a loan application. The second refinancing resulted in count 4, bank fraud, and count 7, false statement on a loan application.

As a result of the first refinancing, the Government alleged that Mrs. Bistrup knowingly signed a false loan application stating that she was employed by Eagle Distributing and had a monthly income of \$10,500.00 when she was admittedly a housewife. Several bankers and the mortgage broker testified, however, that income on a loan can be apportioned between spouses especially, as here, where one has a better credit rating than the other.

As a result of the second refinancing, the Government alleged that Mrs. Bistrup knowingly signed a false loan application stating that she was employed by Eagle Distributing and then had a monthly income of \$35,000.00 when she was still a housewife. Several bankers and the mortgage broker again testified, that income on a loan can be apportioned between spouses especially, as here, where she had a better credit rating than her husband.

The IRS case agent testified that Mrs. Bistrup's husband had over \$700,000.00 per year in illegal earnings during this time period.

SUMMARY OF THE ARGUMENT

The instant appeal of the jury verdicts seeks to reverse the convictions because the Appellant did not knowingly make false statements on loan applications and because the false statements made by her husband, through the mortgage broker, were not material, because her husband had sufficient, albeit, illegal income.

Second, the Government introduced expert witnesses testimony developed after the start of the trial without clear and adequate notice to the Appellant and trial court, where clear and adequate notice would have caused the court to bar such testimony.

Third, the trial court's barring of evidence of an affair that the codefendant hid from the Appellant denied the Appellant a right to a fair and impartial consideration of the evidence in light of the willful blindness instruction requested by the Government and given by the court.

ARGUMENT

I

WHERE THE APPELLANT DID NOT KNOWINGLY MAKE FALSE STATEMENTS ON LOAN APPLICATIONS AND THE FALSE STATEMENTS MADE BY HER HUSBAND, THROUGH THE MORTGAGE BROKER, WERE NOT MATERIAL, BECAUSE HER HUSBAND HAD SUFFICIENT, ALBEIT, ILLEGAL INCOME, THE JURY VERDICTS SHOULD BE REVERSED AND A NEW TRIAL GRANTED.

The Government did not prove the materiality of the Eagle Disturbing employment and income attributable to Nancy Bistrup, that she knowingly made false statements, or that it was wrong to apportion the income on the three loan applications. (Trial transcript 752, 754, 985, 992) With the first refinancing (Trial transcript 779-781) and second refinancing (Trial transcript 811), all that matter was the credit history of Mrs. Bistrup and the loan-to-value ratio. Several bankers and the mortgage broker testified that income on a loan can be apportioned between spouses. (Trial transcript 752, 754, 758, 779-781, 800, 849, 985, 986.) Her purported income and employment were not material to the loans. (Trial transcript 845, 985-986.)

On the initial mortgage, Mrs. Bistrup did not know about the contract for deed. (Trial transcript 1158.)

The IRS case agent testified that Mrs. Bistrup' husband had over \$700,000.00 per year in illegal earnings during this time period. (Trial transcript 2127.)

In this specific case there is insufficient evidence to support the convictions after viewing the evidence most favorably to the prosecution, because a no reasonable jury should have found the Appellant guilty beyond a reasonable doubt. *United States v. Lam*, 338 F.3d 868, 871 (8th Cir. 2003).

INITIAL FINANCING

Keven Davis and Kari Brasel on May 21, 1999 drove down to Mankato and Mrs. Bistrup signed the mortgage closing documents on top of a car over her lunch break. (Trial transcript 532, 536, 557, 566, 575, 1047, 1048, 1119.) She signed an affidavit that said she worked at U. S. Bank. (Trial transcript 585.) (Exhibit 67.) The absurdity of a claim that Mrs. Bistrup was making tens of thousand dollars a month and working part time at U. S. bank as an auto teller was apparently lost of Keven Davis, Kari Brasel (trial transcript 732-735), the government, and certainly the jury. Mrs. Bistrup signed and initialed multiple loan documents for the May 21, 1999 closing that had different loan amounts, different interest rates, and different mortgage amounts. (Trial transcript 731, 757, 758.) She did not read them. (Trial transcript 557, 664, 665, 712.) She knew her husband had already signed them. (Trial transcript 727.) She did not have a realistic opportunity to read them. (Trial transcript 724.) It took 15 minutes. (Trial transcript 1120.) Mrs. Bistrup never said she worked for Eagle Distributing and the government did not have any actual live witnesses to say that heard her say it. (Trial transcript 1124.)

Besides it did not matter. (Trial transcript 752.) No one even verified what Eagle Distributing did.

The three set of documents that say she did work for Eagle Distributing were prepared by Al Bistup and Kari Brasel and Keven Davis. (Trial transcript 1059, 1060, 1120, 1124.) Her husband took care of all the financial deals; he took care of all the mortgages and refinancing. All Mrs. Bistrup did was sign too many documents without reading them. You cannot read all the documents thoroughly in a real-estate closing. You are not at the closings to read, if reading was required, than they should have been provided to Mrs. Bistrup just like they were to Nedegaard, ahead of time.

Her husband had signed first. Her husband had provided the information. Their mortgage broker had prepared most of the documents, specifically including the liabilities from the credit reports.

Materiality is an element of a false statement violation of 18 U.S.C. § 1001 and § 1341, consistent with the law of this circuit. *United States v. Adler*, 623 F.2d 1287, 1291 (8th Cir. 1980). *United States v. Baker*, 200 F.3d 558 (8th Cir. 2000.) Whatever the statements attributable to Mrs. Bistrup, she did not make them knowingly and they were not material.

FIRST REFINANCING

The Government must prove beyond a reasonable doubt that the Appellant "knowingly executed, or attempted to execute, a scheme or artifice ... to defraud a financial institution." 18 U.S.C. § 1344(1). This standard requires evidence that the defendant intended to defraud the victim financial institution. *United States v. Clapp*, 46 F.3d 795, 803 (8th Cir. 1995); *United States v. Stavroulakis*, 952 F.2d 686, 694 (2d Cir. 1992). No financial institution was defrauded.

The first refinancing on January 17, 2001, with Lehman Brothers refinancing was a NINA loan, (no income no assets.) All that mattered was the credit rating and the equity, which were not false. Because the codefendant's credit score was poor, the loan application went forward with Mrs. Bistrup as the sole applicant. In other words, income and employment are not important, not material.

Any misrepresentations made by Kevan Davis and Al Bistrup about Mrs. Bistrup were not material to the loans. These loans were not fraudulent at all because all the banks cared about was value and equity. The mortgages here were sub prime mortgages where interest rates were much higher reflecting larger risk. (Trial transcript 964, 985, 986.)

THE SECOND REFINANCING

The second refinancing May 13 2002 was a stated income loan, (Ex. 117). The income alleged to have been reported by Mrs. Bistrup did not matter at all. The one verified the income.

There is absolutely no evidence that Mrs. Bistrup was involved with the two-year old CPA letter. (Trial transcript 825.) This CPA letter was used to verify the loan application, 1003, that was used to verify the CPA letter, a very incompetent circle. Keven Davis should have caught that letter (Trial transcript 825), unless he prepared it.

Where documents were not prepared in advance Mrs. Bistrup properly listed her employment: the travel club and the credit problem. (Exhibits 127 and 130.) Exhibit 130 shows that Mrs. Bistrup's employment spaces filled in by her and her husband, not by anyone else.

Keven Davis was responsible for the preparation of three 1003s, the loan applications. He was not indicted by the Government. He either had to overlook the inconsistencies in the loan applications or those inconsistencies did not matter.

Kari Brasel and Keven Davis both knew about the IRS investigation and this was clearly not of any concern to them because the closing went through any way.

18 USCS § 1014, the loan and credit applications statute, requires that a person knowingly make a false statement or report to be guilty. False statements which defendants made on loan application were not material simply because banks would

not have made loans if they had discovered that defendants had lied; rather, by looking to purpose of loan forms, it is clear that reliance on false statements would not have changed outcome, for forms correctly identified persons responsible for loans, and therefore, false statements about board approval or designation of secretary or treasurer were immaterial. United States v Williams (1994, CA5 Miss) 12 F3d 452, reh den (1994, CA5).

Materiality of false statement is an element of proving violation of 18 USCS § 1014. United States v Wells (1995, CA8 Mo) 63 F3d 745, reh, en banc, den (1995, CA8).

Mens rea required in 18 USCS § 1014 is that proof be adduced that the Appellant acted with knowledge that statement was false and that

statement was made for purpose of influencing action of covered institution. United States v Lentz (1975, CA5 Ga) 524 F2d 69, reh den (1976, CA5 Ga) 526 F2d 815.

Indictment under 18 USCS § 1014 and 18 USCS § 1344 was multiplicitous, since there was no realistic likelihood of violating narrow provision, § 1014, without also violating broad provision, § 1344, where, upon looking beyond language of statute to particular allegations, submission of false loan applications was simply species of bank fraud. United States v Seda (1992, CA2 NY) 978 F2d 779.) The trial court denied the motion dismiss the duplicitous counts, (Trial transcript 2147.)

In order to meet its burden of proof in prosecution under 18 USCS § 1014, government must show (1) that statement has been supplied by defendant to specified lending institution which is capable of influencing institution's decision to loan funds, and (2) that statement is knowingly false. *United States v Simmons* (1974, CA5 Ga) 503 F2d 831.

In prosecution for violation of 18 USCS § 1014, prosecutor must show that defendant misrepresented value of check presented to bank and careless checkbook recordkeeping is not enough to satisfy this requirement. *United States v Khamis* (1982, CA5 Tex) 674 F2d 390. Similarly, Mrs. Bistrup's negligence in signing and initialing without reading prepared documents is not enough.

18 USCS § 1344, the bank fraud statute, requires that a person act knowingly and the false representations be material.

With respect to criminal offenses, materiality is one element of "scheme or artifice to defraud" prohibited by federal mail fraud (18 USCS § 1341), wire fraud (18 USCS § 1343), and bank fraud (18 USCS § 1344) statutes, even though statutes' text does not mention materiality. Neder v United States (1999, US) 144 L Ed 2d 35, 119 S Ct 1827. Materiality was element of offense of conspiracy to commit bank fraud. United States v Jobe (1996, CA5 Tex) 90 F3d 920 (criticized in United States v Wiles (1996, CA10 Colo.) Materiality of falsehood was still element of bank fraud, jury

instructions which tracked statutory language of 18 USCS § 1344, emphasizing importance of finding fraud and defining "scheme to defraud" and "intent to defraud," adequately placed issue of materiality before jury. United States v Pribble (1997, CA7 Ill) 127 F3d 583, reh, en banc, den (1997, CA7 Ill)

People sign form documents all the time without reading the boilerplate--this is notoriously so in many contexts (hospital admissions; airline tickets, now computer software programs.) The fact that the documents may recite that the signer has read it before signing is not

decisive. The strength of an inference that the signer did read the document, or specific portions of it, depends on the circumstances: for example, the time spent, the seriousness of the transaction, whether the material was filled in or merely boilerplate.

The Court in United States v Corchado-Peralta (2003, CA1 Puerto Rico) 318 F3d 255 recognized the fact that there are instances where a defendant who has signed a bank loan application and did not read the application containing the false information concerning her employment that was inserted in application by her spouse was not aware of misrepresentations.

Given the circumstances here in the three closings, where there was reliance by Mrs. Bistrup on her husband and the mortgage broker, the fact the documents were prepare ahead of time, the lack of time to adequately read the documents, the lack of

materiality, the appropriateness of apportionment of income, Mrs. Bistrup is not guilty of any crime.

II

WHERE THE GOVERNMENT INTRODUCED EXPERT WITNESSES TESTIMONY DEVELOPED AFTER THE START OF THE TRIAL WITHOUT CLEAR AND ADEQUATE NOTICE TO THE APPELLANT AND TRIAL COURT, AND WHERE CLEAR AND ADEQUATE NOTICE WOULD HAVE CAUSED THE COURT TO BAR SUCH TESTIMONY, THE JURY VERDICTS SHOULD BE REVERSED AND A NEW TRIAL GRANTED.

Mrs. Bistrup filed a motion for discovery of Rule 16 evidence.

The Government in its trial brief (document 65 filed May 18, 2005), noted the limited use of a handwriting expert who they expect:

“would identify handwriting in checkbook registers seized from the Bistrup residence. These registers reflect the defendants’ depositing investors funds into bank accounts, and then spending the money for their own use and benefit. Handwriting in the registers also demonstrates that Nancy Bistrup balanced the check books for both herself and Al Bistrup, and thus is aware that Al Bistrup wasn’t sending the money overseas or elsewhere to be invested. To the contrary, she was aware that she and her husband were spending the investors’ money.”

At trial, the Government sought to broaden the testimony of the handwriting expert but the judge limited the testimony. (Trial transcript 1813-1818; 1853-1855; and 2170.)

The government was not completely forthcoming in its late oral notice to the defense and snuck in a sparse statement about handwriting identification on the first refinancing, Exhibit 89, Counts 3 and 6. (Trial transcript 1815, and 2170.) That evidence turned out to be a major part of the government's final argument. (Trial transcript 2170.) No written summary of the changed testimony was provided. As a result, the CJA attorney for the Appellant was surprised and unable to get an expert in the midst of the trial to challenge the then obscure evidence and to provide a fair opportunity to test the merit of the expert's testimony through focused cross-examination. This last-second-mid-trial-oral notification of evidence resulted in much of the proposed testimony being excluded by the judge because the discovery rules were been violated in a manner that prejudiced the Appellant's substantive rights. The Appellant could have hired an expert to rebut expert testimony if she had been informed of the government's intentions sufficiently in advance of trial. *United States v Johnson* (2000, CA8 Ark) 228 F3d 920. *United States v. Ortega*, 150 F.3d 937(8th Cir. 1998).

III

WHERE COURT BARRED THE APPELLANT FROM OFFERING EVIDENCE OF THE CO-DEFENDANT'S EXTRA MARTIAL AFFAIR THE JURY VERDICTS SHOULD BE REVERSED AND A NEW TRIAL GRANTED.

The Court prohibited the Mrs. Bistrup from showing evidence that her husband had concealed an extra-marital affair from her. (Trial transcript 936, 1627, 1883-1885.) Such evidence would have significantly bolstered her defense that her husband concealed many things from her particularly in light of the Government's requested willful blindness instruction that the court gave. (Trial transcript 1903, 17-1908, 25; 1911.) It would have

mitigated the Government's argument that she had to know when they moved from \$135, 000 house to a over million dollar townhouse, the so-called palace-on-the-hill. The trial court inadvertently played to this theme when he said at the start of the trial that his wife is his trusted advisor. (Trial transcript 41.)

Relevant testimony is assumed admissible, Fed. R. Evid. 402, unless its probative value is "substantially outweighed" by the possibility of unfair prejudice. Fed. R. Evid. 403. Once a party has demonstrated the relevance and probative value of the evidence, the role of the district court is simply to determine whether admission of the exhibit would create an "undue tendency to suggest decision on an improper basis." Notes of Advisory Committee, Fed. R. Evid. 403. A district court may exclude relevant evidence if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Fed. R. Evid. 403.

Given the overwhelming evidence against the codefendant, the prejudice to the codefendant was nonexistent. An appeals court does not reweigh the evidence, but determines only whether the district court abused its discretion in excluding the evidence. *United States v. Derring*, 592 F.2d 1003, 1007 (8th Cir. 1979).

The Government knew that the codefendant had had the extra marital affair at the time of the motion. The Government through the trial attempted to minimize the codefendant's efforts to hide facts from the Appellant. The Government also argued that stolen funds were not income, yet produced no evidence that the Defendant herself knew the monies were stolen.

The joint trial forced the trial court to balance the harm to each defendant. The massive evidence of her husband's fraud should have should have instead caused the trial court to focus on the harm to the Appellant alone.

The theft of money from widows, orphans, and invalids was compelling and overwhelming. Because Mrs. Bistrup was unable to show how her husband hid things from her, including an affair (trial transcript 1993-1885) and because she had the benefit of that money she was found guilty of all counts against her including the quick signing on the hood of a car in Mankato. Mrs. Bistrup was just as deceived as her relatives and friends and needed to show that the codefendant was a despicable person

to her as well.

The jury was unable to compartmentalize the evidence against her even though defense counsel sought to do that during the trial. *United States v. Washington*, 318 F.3d 845, 858 (8th Cir. 2003); *United States v. Jackson*,

64 F.3d 1213, 1217 (8th Cir. 1995).

Most of the Government's evidence, thirty-two of the thirty-eight counts, related to conduct not involving Mrs. Bistrup and was highly prejudicial to her defense. The voluminous evidence offered at the trial involving the codefendant and the admission of such evidence at a joint trial caused confusion and prejudice. The trial court wrongly denied the Appellant the opportunity to introduce evidence of the extra marital affair and bolster her argument that the her husband hid much information from her. The prohibiting of proof of the codefendant's extra martial affair has denied the Appellant a fair trial and requires a judgment of acquittal.

CONCLUSION

For the reasons set forth herein, appellant respectfully requests that her convictions be vacated and she be found not guilty.

Dated: October 19, 2005

Rick E. Mattox
Attorney at Law
16670 Franklin Trail SE, Suite 250

Prior Lake, Minnesota 55372
(952) 469-2299
Attorney Reg. No. 0068731

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused two true and correct copies of Appellant's brief to be served by hand delivering two copies thereof to the United States Attorney's office at the U.S. Courthouse, 300 South Fourth Street, Minneapolis, MN 55415, upon the following:

John Marti
Assistant United States Attorney

On this 27th day of September 2005.

Rick E. Mattox
Attorney at Law
16670 Franklin Trail SE, Suite 250
Prior Lake, Minnesota 55372
(952) 469-2299
Attorney Reg. No. 0068731

CERTIFICATION OF COMPLIANCE

The undersigned attorney for Appellant certifies this brief complies with the type – volume of the limitations of Federal Rules of Appellate Procedure 32. The brief was created using Word 2002. This brief has 380 lines of proportional spaced type. The undersigned attorney for Appellant certifies that this brief was prepared using Times New Roman font in font size 14 and that the enclosed computer CD containing the full text of the appellant's Brief has been scanned for viruses and is virus-free.

Rick E. Mattox
Attorney at Law
16670 Franklin Trail SE, Suite 250
Prior Lake, Minnesota 55372
(952) 469-2299
Attorney Reg. No. 0068731

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-2603

Criminal

UNITED STATES OF AMERICA,

APPELLEE,

vs.

Nancy K. Bistrup,

APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MINNESOTA

THE HONORABLE DAVID S. DOTY, PRESIDING

ADDENDUM OF APPELLANT'S BRIEF

Rick E. Mattox
Attorney at Law
16670 Franklin Trail SE, Suite 250
Prior Lake, Minnesota 55372
(952) 469-2299
Attorney Reg. No. 0068731

ATTORNEY FOR APPELLANT

APPELLANT'S ADDENDUM

| | Page |
|-------------------------------------|------|
| 1. Judgment in a criminal case..... | 1- 8 |